STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION OF BULLDOG COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8153-M1	AQB 21-31
JAYHAWK COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8152-M1	AQB 21-32
LONGHORN COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8349-M2	AQB 21-33
COWBOY CDP (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7877-M1	AQB 21-34
WILDCAT COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7474-M2	AQB 21-35
MAVERICK COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7565-M2	AQB 21-39
SPARTAN COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7681-M2	AQB 21-40
TIGER COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7623-M2	AQB 21-41

WILDEARTH GUARDIANS' CLOSING ARGUMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLOSING ARGUMENT

INTRODUCTION

Ambient air quality in southeast New Mexico is exceeding or very nearly exceeding the federal air quality standard for ozone.[1] Indeed, all air quality monitoring sites in southeast New Mexico have violated this ozone standard in recent years.[2] This is significant because ozone pollution beyond this standard can seriously harm public health by decreasing lung function, causing respiratory inflammation, exacerbating asthma and allergies, and can even lead to hospitalizations and premature death.[3] For this and other reasons, there is significant public interest in air quality permits that would authorize oil and gas facilities to increase emissions of air contaminants and lead to more ozone formation. The September 2021 rulemaking hearing before the New Mexico Environmental Improvement Board, EIB No. 21-27, which proposed stricter ozone-related pollution regulations for the oil and gas industry, is a recent example of the seriousness of this issue and the public's interest and concern.

In light of this air quality problem in New Mexico, WildEarth Guardians ("Guardians") requested public hearings to ensure that the construction permits proposed for eight XTO Energy, Inc. ("XTO" or "Applicant")-operated oil and gas facilities comply with the laws, rules, and standards of the New Mexico Air Quality Control Act ("AQCA") and the federal Clean Air Act ("federal act"), as well as to ensure the New Mexico Environment Department ("Department") issued the permits in accordance with the law. In written testimony and at the two-day hearing commencing on October 25, 2021, Guardians brought forward an affirmative case, explaining how the Department's legal notices for five of the eight proposed permits

[1] Guardians Exhibit 3 at 4.
[2] *Id.; see also* 21-31_AR333-339.
[3] U.S. EPA, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65303-11 (Oct. 26, 2015)

violated the rules under the AQCA. Guardians also brought forward an affirmative case, explaining how, for all eight proposed permits, the proposed emissions limits for venting gas during startup, shutdown, maintenance, and malfunction ("SSM/M") events do not comply with the applicable legal requirements. Finally, Guardians brought forward an affirmative case, explaining how, for all eight proposed permits, the Department's issuance of the permits would not be in accordance with the law. For these reasons, Guardians respectfully requests the Cabinet Secretary to direct the Department to address the deficiencies in all the proposed permits or deny all the permit applications.

I. Background and Procedural History

Between April 22, 2020 and April 7, 2021, XTO Energy, Inc. ("Applicant" or "XTO") filed eight applications to modify the construction permits for eight oil and gas facilities – the Bulldog, Jayhawk, Longhorn, Wildcat, Maverick, Spartan, and Tiger Compressor Stations and the Cowboy Central Delivery Point (the "Facilities").[4] The proposed permits for the Facilities would authorize each facility to increase emissions of nitrous oxides and volatile organic compounds, among other air contaminants.[5] Concerned about these proposals to further increase ozone precursors in part of New Mexico that has demonstrated recent exceedances and violations of the ozone NAAQS, Guardians reviewed the permit applications and submitted written public comments related to each application between November 24, 2020 and May 24, 2021, raising questions about the permit applications and requesting public hearings.[6] Guardians' comments raised a number of questions and concerns with the permit applications, regarding legal notice,

[4] NMED Amended Exh. 21 at 2; NMED Exh. 31 at 3; NMED Amended Exh. 22 at 2; NMED Amended Exh. 27 at 3; NMED Amended Exh. 34 at 3; NMED Exh. 32 at 3; NMED Amended Exh.23 at 2; NMED Amended Exh. 24 at 2.
[5] 21-31_AR246; 21-32_AR433; 21-33_AR226; 21-34_AR871; 21-35_AR351; 21-39_AR624; 21-40_AR291; 21-41_AR292.
[6] 21-31_AR333-340; 21-32_AR575-582; 21-33_AR312-319; 21-34_AR891-893; 21-35_AR258-264; 21-39_AR775-780; 21-40_AR388-392; 21-41_AR387-391.

compliance with state and federal air regulations, among other issues. The Department released draft permits and statements of basis for the Facilities between March 2, 2021 and June 11, 2021,[7] and Guardians filed second sets of written public comments related to each application between March 25, 2021 and July 12, 2021, again, raising questions about the permit applications, as well as the proposed permits, and requesting public hearings.[8] The Department did not substantively respond to any of these comments until October 12, 2021, when the Department filed its Statement of Intent to Present Technical Testimony.[9]

Based on Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permits, New Mexico Environment Department Cabinet Secretary, James Kenney ("Cabinet Secretary") granted public hearings for XTO's three permit applications regarding the Bulldog, Jayhawk, and Longhorn facilities in a Public Hearing Determination dated February 11, 2021.[10] In a separate Public Hearing Determination dated June 1, 2021, the Cabinet Secretary granted public hearings for XTO's remaining five permit applications regarding the Cowboy, Wildcat, Maverick, Spartan, and Tiger facilities.[11] On June 24, 2021, the Cabinet Secretary subsequently ordered public hearings be held in the matters of all eight applications and appointed Gregory Chakalian to serve as Hearing Officer in these

[7] NMED Amended Exh. 21 at 3; NMED Exh. 31 at 4-5; NMED Amended Exh. 22 at 3; NMED Amended Exh. 27 at 4; NMED Amended Exh. 34 at 4; NMED Exh. 32 at 4; NMED Amended Exh.23 at 3; NMED Amended Exh. 24 at 3.
[8] 21-31_AR341-346; 21-32_AR583-588; 21-33_AR884-889; 21-34_AR3265-3270; 21-35_AR273-277; 21-39_AR781-784; 21-40_AR393-396; 21-41_AR393-395.
[9] AQB 21-31 et al. Hearing Transcript, Volume 2 (October 26, 2021) ("Day 2 Transcript") at 315; *see also* Guardians Amended Exhibit 1 at 6.
[10] New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Feb. 11, 2021).
[11] New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Jun. 1, 2021). Importantly, while the February 11, 2021 Public Hearing Determination granted public hearings for the Bulldog, Jayhawk, and Longhorn facilities only as to the issues not addressed in EIB 20-21(A) and 20-33(A), the June 1, 2021 Public Hearing Determination did not likewise restrict the issues that could be considered during the public hearings for the Cowboy, Wildcat, Maverick, Spartan, and Tiger facilities.

matters.[12] Following a July 7, 2021 scheduling conference, the Hearing Officer consolidated all eight XTO permit hearings together, along with two other public hearings, all of which involved construction permit applications for a total of ten oil and gas facilities in southeast New Mexico.[13]

As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.[14] On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.[15] As a result of the Hearing Officer's order, Guardians redacted its witness's written testimony, where it discussed this issue, and did not present further testimony or evidence on this issue during the public hearing.

Along with the Joint Motion in Limine, on October 12, 2021 the parties also filed Statements of Intent to Present Technical Testimony with regard to each of the eight cases

[12] Notice of Hearing and Appointment of Hearing Officer, AQB 21-31 – AQB 21-35 and AQB 21-39 – AQB 21-41 (Jun. 24, 2021).
[13] Scheduling Order, AQB 21-31 et al. (Jul. 20, 2021).
[14] Joint Motion in Limine, AQB 21-31 et al. (Oct. 12, 2021).
[15] AQB 21-31 et al. Hearing Transcript, Volume 1 (October 25, 2021) ("Day 1 Transcript") at 40, 61-63. We note that the Hearing Officer did not grant the Joint Motion in Limine for the reasons stated in the Joint Motion but rather granted the motion, *sua sponte*, on the two grounds explicated by the Hearing Officer.

regarding XTO's permit applications. As mentioned above, these filings were the first substantive response to Guardians public comments since it filed its first set of comments on November 24, 2020. The Applicant's and the Department's Statements of Intent to Present Technical Testimony helped to resolve several concerns Guardians had raised in its earlier public comment letters, and Guardians, accordingly, focused its testimony during the public hearing on three remaining issues of concern with regard to XTO's applications – legal notice, the proposed SSM/M emission limits, and the Department's compliance with New Mexico Executive Order 2005-056.[16]

A two-day virtual hearing was held on October 25 and 26, 2021. This post-hearing submittal is timely-filed in accordance with 20.1.4.500 NMAC and the Hearing Officer's December 1, 2021 Order Granting Joint Extension, setting the deadline for post-hearing filings to no later than 5:00 pm, December 3, 2021.

II. Burden of Persuasion

For the purposes of the public hearing on the eight XTO permit matters before the Secretary, the New Mexico Administrative Code establishes a burden of persuasion for each of the parties in this case – the Applicant, the Department, and Guardians. 20.1.4.400A.(1) NMAC. As the permit applicant, XTO must prove that the proposed permit should be issued and not denied. *Id.* This burden does not shift. *Id*.

Separately, the Department "has the burden of proof for a challenged condition of a permit," which the Department has proposed. *Id*. For purposes of Guardians' argument that the SSM/M emission limits are inadequate, improper, and invalid, Guardians must present an

[16] The Final Order in EIB 20-21 and 20-33 did not address Guardians' concerns about ozone with regard to the Facility's proposed permit, but Guardians did not present testimony and evidence on this issue due to the Hearing Officer order granting the Joint Motion in Limine.

affirmative case on the challenged condition. *Id*. The Hearing Officer must determine each matter in controversy by a preponderance of the evidence. 20.1.4.400A.(3) NMAC.

The Environment Department's Permit Procedure regulations do not establish a burden of proof for issues that do not involve a specific permit condition. *See id*. at A(1).

III. Standard of Review

When taking administrative action, the Secretary and the Department must fundamentally ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; is supported by substantial evidence in the record; and is otherwise in accordance with law. NMSA 1978 § 74-2-9(C). "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 104.

In addition to the Department's standards for administrative actions, the Air Quality Control Act, NMSA 1978, § 74-2-7C, and the pre-construction permitting rule, 20.2.72 NMAC, establish additional reasons why the Secretary and the Department may or must deny an application for a proposed construction permit. According to section 74-2-7C NMSA, the Department may deny an application for a construction permit if it appears that the construction or modification:

a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act;
b) will cause or contribute to air contaminant levels in excess of a national or state standards or, within the boundaries of a local authority, applicable local ambient air quality standards; or
c) will violate any other provision of the Air Quality Control Act or the federal act.

Pursuant to the New Mexico pre-construction regulations the Department also must deny an application for a permit or permit revision based on eight independent factors, which include:

A. It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act;
B. The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board;
C. For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC;
D. The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable;
E. The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment;
F. Any provision of the Air Quality Control Act will be violated;
G. It appears that the construction of the new source will not be completed within a reasonable time; or
H. The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

20.2.72.208 NMAC.

ARGUMENT

I. The Department failed to satisfy the legal notice requirements for the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat facilities.

The Department violated its Public Notice and Participation regulations for Part 72 construction permits by failing to include instructions for how members of the public could submit written comments electronically in its legal notices for the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat facilities. These five permit applications, therefore, must be denied.

The Public Notice and Participation regulations at 20.2.72.206 NMAC establish the Department's procedural due process requirements in the context of reviewing Part 72 construction permits. According to these regulations, once the Department has determined a permit application for a construction permit is administratively complete, the Department is legally obligated to publish a public notice of the permit application, including specific information identified in the construction permit regulations. *See* 20.2.72.206A.(3) NMAC. Among other information that must be included in the public notice, the Department:

> "shall identify the location of the permit application and department's analysis (when available) for public review and describe the manner in which comments or evidence may be submitted to the department…"

Id.

Information as to how members of the public may submit comments or evidence to the Department is critical because it is only through submitting a comment expressing interest in a permit application that the Department is then required to release its analysis of the permit application and a draft of the proposed permit and administer a second 30-day public comment period. 20.2.72.206B. NMAC. Moreover, it is only through submitting a comment expressing interest in a permit application that the Department is then required to notify those expressing an interest in the permit application of the location of the Department's analysis of the permit application. *Id*. at B.(1). In other words, critical due process and public participation rights can

only be secured by submitting a comment on a permit application, which depends fundamentally on an understanding of how comments may be submitted to the Department. With regard to the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat applications, the Department failed to provide the public information necessary to understand how it could submit comments on these applications to the Department.

Each of the Department's legal notices for the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat applications included the following description for how members of the public could submit comments to the Department:

> "All interested person have thirty (30) days from the date this notice is published, to notify the Department in writing of their interest in the permit application…The written comments should be mailed to [permit writer's name], New Mexico Environment Dept., Air Quality Bureau, Permit Section, 525 Camino de los Marquez Suite 1, Santa Fe, NM 87505-1816."[17]

This language only describes how members of the public should submit comments on the permit applications to the Department's physical address. The legal notice does not indicate that comments may be submitted electronically nor does the legal notice provide an email address where comments would be accepted.[18] As Guardians' comment letters indicated, omitting this information was a critical oversight by the Department not only because the Department was, in fact, accepting public comment submitted electronically, [19] but also because of the public's ability to safely submit comments to the Department's physical address has been severely limited by the COVID-19 virus.

[17] 21-31_AR247; 21-32_AR434; 21-33_AR227; 21-34_AR872; 21-35_AR352.
[18] *See id.*
[19] 21-31_AR342; 21-32_AR584; 21-33_AR885; 21-34_AR3266; 21-35_AR274-275.

To submit a comment to the Department's physical address could require a person to take actions that risk exposure to the COVID-19 virus, including purchasing paper, writing instruments, envelopes, and postage and depositing the comment letter at a post office. These actions pose even greater risks to individuals who are elderly, immune-compromised, have co-morbidities, and for those who may be caring for family members and friends with these risk factors. The Department has acknowledged the public health risks of people gathering indoors in the midst of the COVID-19 pandemic by closing some of its offices,[20] as well as revising and republishing legal notices for some construction permits to include instructions for electronic submission of public comments.[21] The Department's witnesses testified that the revision and republication of these legal notices was, in part, due to the public health emergency created by COVID-19.[22] It would have been reasonable and consistent for the Department to extend these public health precautions to members of the public who may have been interested to comment on the Bulldog, Jayhawk, Longhorn, Cowboy and Wildcat applications, but as we discussed above, the Department chose not to revise and republish the legal notices for these five facilities. As a result, some members of the public who could have otherwise submitted comments electronically may have decided not to submit comments because the only method of comment submission identified in the Department's legal notices could have entailed exposure to the COVID-19 virus.

Testimony from the Department's witnesses during the public hearing suggested that even had the legal notices for the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat

[20] 21-31_AR246; 21-32_AR433; 21-33_AR226; 21-34_AR871; 21-35_AR351; 21-39_AR624; 21-40_AR291; 21-41_AR292
[21] NMED Amended Exh. 23 at 5; NMED Amended Exh. 24 at 4-5; NMED Exh. 32 at 4; *see also* Day 1 Transcript at 222, 234-235, 240, 247-49.
[22] Day 1 Transcript at 222, 235

applications included instructions for how to submit comments electronically, it likely would not have generated additional public interest or comments.[23] However, the construction permit regulations do not require the Department to include instructions for electronic comment submission only in cases where those instructions are likely to generate public interest. The construction permit regulations have no such qualification limiting when the Department may or may not inform the public of the means in which they may submit comments. *See* 20.2.72.206 NMAC. The regulations require that for all construction permit applications, the Department must "describe the manner in which comments or evidence may be submitted to the department," 20.2.72.206A.(3) NMAC, and the Department failed to do that with respect to the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat applications.

Testimony from the Department's witness, Melinda Owens, during the public hearing also suggested that legal notices do not include instructions for electronic comment submission because the regulations do not "explicitly call out" a requirement that the Department do so.[24] Setting aside the fact that Ms. Owens is not an attorney or legal expert,[25] her reading of the plain language of the regulations is mistaken. The construction permit regulations require the Department to describe "the manner," not "a manner," in which comments or evidence may be submitted to the Department. 20.2.72.206A.(3) NMAC. The regulatory language indicates it is not enough for the Department to only indicate a singular manner in which comments may be submitted. Rather, a common understanding of this regulatory language means that if public comments may be submitted to the Department electronically (as was the case for the Bulldog,

[23] NMED Amended Exh. 21 at 8; NMED Exh. 31 at 11; NMED Amended Exh. 22 at 8; NMED Amended Exh. 27 at 9; NMED Amended Exh. 34 at 8-9.
[24] Day 1 Transcript at 248.
[25] *See* NMED Exh. 35.

Jayhawk, Longhorn, Cowboy, and Wildcat applications), the Department must identify this manner of submission in the legal notice.

Ms. Owens also suggested at hearing that the omission of instructions in the legal notice for how to submit public comment electronically was "based very strictly on the regulation" and on the fact that "the regulation was written pre public acceptance of the Internet and e-mails."[26] However, Ms. Owens opinion ignores that in the administrative context, due process is flexible in nature and responsive to the circumstances of a given situation, as a whole.[27] The context relevant to the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat applications involved serious public health risks due to the COVID-19 virus, as discussed above, that should have led the Department to identify a safe means for all members of the public to participate in the public comment process. Moreover, Ms. Owens' strict reading of the regulations in section 20.2.72.206A.(3) apparently doesn't extend to the Department's reading of other regulations in Part 72, which require the Department "mail" certain documents despite the Department's practice of emailing these documents.

Subsections A.(6), and A.(7) of 20.2.72.206 NMAC require the Department, in certain circumstances, to "mail" notice documents to particular parties, but the Administrative Record for the Wildcat application – the permit application reviewed and administered by Ms. Owens – indicates Ms. Owens submitted these notices via email.[28] Since the Department already interprets 20.2.72.206A.(6) and (7) NMAC to allow electronic mailing, it would be arbitrary for the Department to interpret 20.2.72.206A.(3) to preclude electronic mailing simply because Ms.

[26] Day 1 Transcript at 249.
[27] *Alb. Bernalillo Co. Water Utility Authority v. NMPRC*, 2010-NMSC-013, P 28, 148 N.M. 21, 34.
[28] 21-35_AR254, 265-268.

Owens testified the regulations were written at a time before public acceptance of the Internet and emails.

The Department is obligated to publish a legal notice for every construction permit application that informs members of the public how comments and evidence may be submitted to the Department. At a time when submitting comments through the post could have resulted in serious public health impacts and at a time when the Department was, in fact, accepting comment electronically, the Department was required to include instructions in the legal notices for the Bulldog, Jayhawk, Longhorn, Cowboy, and Wildcat applications for how to submit comments and evidence electronically. The Department's legal notices for these permit applications did not include this information, which violated 20.2.72.206A.(3) NMAC. Accordingly, the Department must revise and republish these legal notices, offering the public a new 30-day comment period, or the Department must deny these permit applications.

II. The proposed SSM/M emission limits will not meet the applicable requirements of the AQCA or the federal act.

Permit limitations established in a permit issued pursuant to an EPA-approved State Implementation Plan ("SIP") must be practically enforceable. Here, the proposed startup, shutdown, and maintenance ("SSM") and malfunction ("SSM/M") emission limits for the Facilities are not practically enforceable and, accordingly, the proposed permits must be revised or denied.

Practical enforceability is a fundamental element of permit limitations in permits issued pursuant to an EPA-approved SIP. Without practically enforceable permit limitations, air pollution control agencies would be unable to ensure facilities comply with applicable air pollution laws and regulations established to ensure air quality standards are met and air

pollution is prevented or abated – two duties set out in the AQCA. *See* NMSA § 74-2-5A. and B.(1). Further, practically enforceable permit limitations are also used to prevent an emission source from qualifying as a major source by restricting the source's potential to emit below the major source threshold. However, to appropriately limit a source's potential to emit, only permit limitations that are both practically enforceable (enforceable as a practical matter) and federally enforceable may be considered.[29]

A permit limitation is federally enforceable if it is contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved by EPA as such.[30] To be practically enforceable, a permit limitation must be consistent with at least three criteria set out by the EPA. A source-specific permit term must specify:

1) a technically accurate limitation and the portions of the source subject to the limitation;
2) the time period for the limitation (hourly, daily, monthly, annually); and
3) the method to determine compliance including appropriate monitoring, record keeping and reporting.[31]

The third criterion is essential to practical enforceability because without a specific method to determine compliance, there is no assurance that the data necessary for compliance determinations will be accurately and properly collected.[32] The proposed permit limits for SSM/M emissions from all eight XTO facilities do not specify a method for quantifying the total volume of gas emitted during SSM/M events to determine compliance.

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[29] U.S. EPA, *Guidance on Limiting Potential to Emit in New Source Permitting* (Jun. 13, 1989) at 1-2, www3.epa.gov/airtoxics/pte/june13_89.pdf.
[30] *Id*.
[31] U.S. EPA, *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits* (Jan. 25, 1995) at 6.
[32] *See* Hu Honua Bioenergy Facility, Petition No. IX-2011-1 (Feb. 7, 2014) at 10, epa.gov/sites/default/files/2015-08/documents/hu_honua_decision2011.pdf.

Section A107 in each of the eight proposed permits establishes emission limits for startup, shutdown, and maintenance events and malfunction events.[33] In particular, section A107 in each permit proposes that annual emissions of VOCs from venting gas due to SSM events total no more than 10 tons per year ("tpy") and no more than 10 tpy of VOCs from venting gas due to malfunction events.[34] Subsections of A107 in each of the eight proposed permits proceed to establish additional monitoring, recordkeeping, and reporting requirements necessary to determine whether the Applicant is in compliance with the emission limits.[35] However, the requirements for monitoring and recording the quantity of VOCs emitted during SSM/M events fail to establish a specific methodology the Applicant must use.

In all but one of the proposed permits, the monitoring requirements for emissions during SSM events only vaguely require the Applicant to "monitor the permitted routine and predictable startups and shutdowns and scheduled maintenance events."[36] For emissions during malfunction events, all eight proposed permits only require the Applicant to "monitor all malfunction events that result in VOC emissions including identification of the equipment or activity that is the source of emissions."[37] These monitoring sections for both types of emission events do not provide further detail for how the Applicant should conduct this monitoring.[38] The subsequent recordkeeping sections for SSM and malfunction events provide slightly more detail about what

[33] 21-31_AR288-291; 21-32_AR484-487; 21-33_AR268-271; 21-34_AR358-361; 21-35_AR295-298; 21-39_AR682-685; 21-40_AR344-347; 21-41_AR343-346.
[34] *Id*.
[35] 21-31_AR289-290; 21-32_AR486-487; 21-33_AR269-270; 21-35_AR297-298; 21-39_AR683-685; 21-40_AR345-346; 21-41_AR344-345.
[36] Although the monitoring conditions for floating roof tank SSM emissions in the Cowboy draft permit (AQB 21-34) include different requirements than the monitoring conditions for SSM emissions in the other seven proposed permits, the monitoring conditions in the draft Cowboy permit suffer the same deficiency by not specifying how the Applicant must quantify the total amount of emissions released during SSM events. *See* 21-34_AR359-360.
[37] 21-31_AR289-290; 21-32_AR486-487; 21-33_AR269-270; 21-35_AR297-298; 21-39_AR683-685; 21-40_AR345-346; 21-41_AR344-345.
[38] *See id.*

types of information should be recorded but, again, all eight proposed permits fail to specify a methodology for measuring the quantity of gas emitted during SSM/M events, only stating in relevant part:

> "To demonstrate compliance, each month records shall be kept of the cumulative total of VOC emissions during the first 12 months due to SSM events and, thereafter of the monthly rolling 12-month total VOC emissions. (2) Records shall also be kept of the inlet gas analysis, the percent VOC of the gas based on the most recent gas analysis, and of the volume of total gas vented in MMscf used to calculate the VOC emissions due to SSM events";[39] and

> "To demonstrate compliance, each month records shall be kept of the cumulative total of all VOC emissions due to malfunction events during the first 12 months and, thereafter of the monthly rolling 12-month total VOC emissions due to malfunction events. (2) Records shall also be kept of the inlet gas analysis, the percent VOC of the gas based on the most recent gas analysis, of the volume of gas vented in MMscf used to calculate the VOC emissions…"[40]

The proposed permits do not establish a particular methodology for quantifying the amount of emissions released during these events. Absent a required quantification methodology, the Applicant would have no obligation to monitor and record these emissions according to an understood method that ensures the emissions are accurately quantified. In other words, nothing

[39] 21-31_AR289; 21-32_AR486; 21-33_AR269; 21-34_AR359; 21-35_AR297; 21-39_AR683; 21-40_AR345; 21-41_AR344.
[40] 21-31_AR290; 21-32_AR486; 21-33_AR269; 21-34_AR361; 21-35_AR298; 21-39_AR684-685; 21-40_AR346; 21-41_AR345.

in the proposed permits would prevent the Applicant from quantifying the total emissions during SSM/M events based on more than a guesstimate. As such, the Department (and, in effect, the public) cannot be assured that the monitoring data it receives was discerned using an appropriate methodology that accurately quantifies the total vented emissions.

The Department provided testimony from its staff that there is, in fact, a particular methodology for quantifying emissions released during SSM/M events, which requires specific "engineering knowledge" of the interior gas volume of individual equipment undergoing SSM/M events.[41] However, during the hearing, each of the Department's witnesses involved in drafting the eight proposed permits admitted that the specific methodology for quantifying the volume of gas emitted during these events is not included in the proposed permits.[42]

Pursuant to the AQCA, the Environment Department may deny any application for a construction permit if it appears that the construction or modification will not meet applicable standards, rules or requirements of the AQCA or the federal act or will violate any other provision of the AQCA or the federal act. NMSA § 74-2-7C.(1)(a) and (c). As discussed above, the federal act requires permit limitations established in air quality permits to be practically enforceable, and because the proposed SSM/M emission limits are not practically enforceable the Department should revise the propose permits or deny the applications.

III. The Department's issuance of the proposed permit would not be in accordance with Executive Order 2005-056.

[41] NMED Amended Exh. 21 at 10-11; NMED Exh. 31 at 11-12, 14-15; NMED Amended Exh. 22 at 10, 12-13; NMED Amended Exh. 27 at 10-11; NMED Amended Exh. 34 at 9, 11-12; NMED Exh. 32 at 9-11; NMED Amended Exh. 23 at 10-11; NMED Amended Exh. 24 at 9-11.

[42] With regard to the Bulldog, Longhorn, Spartan, and Tiger facilities, *see* Day 2 Transcript at 229-230. With regard to the Cowboy facility, *see* Day 2 Transcript at 237-238. With regard to the Jayhawk and Maverick facilities, *see* Day 2 Transcript at 245-234. With regard to the Wildcat facility, *see* Day 2 Transcript at 252-254.

In reviewing the applications for all eight Facilities and the associated proposed permits, the Department did not satisfy its legal obligations according to Executive Order 2005-056 ("EO 2005-056"). As a result, the Department must properly address its obligations pursuant to EO 2005-056 or deny the proposed permits.

Administrative agencies have an implied duty to ensure its actions meet the legal standards of the New Mexico Administrative Procedures Act. *See* NMSA 1978, §§ 12-8-1 – 12-8-25. The Air Quality Control Act specifically refers to these legal standards in establishing the grounds on which a Department decision may be set aside by an appellate court. NMSA 1978, § 74-2-9C. Pursuant to this legal standard, the Department must ensure its actions are not arbitrary, capricious, or an abuse of discretion; are supported by substantial evidence in the record; and are otherwise in accordance with law. Executive Orders have the force of law and are among the laws with which the Department's actions must comply.[43]

EO 2005-056 directs the Department to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.[44] To address this legal obligation, the Department testified that it applied NMED Policy 07-13.[45] However, that policy establishes the Department's public participation policy, not an environmental justice policy that meets the obligations set forth in EO 2005-056. In fact, EO 2005-056 is never mentioned in NMED Policy 07-13 and the term "environmental justice" does not appear in the "Subject," "Purpose," "Policy," or

[43] 81A C.J.S. States § 257; *see also* 81A C.J.S. States § 130b.
[44] State of New Mexico, Executive Order 2005-056: Environmental Justice (Nov. 18, 2005) at 2.
[45] NMED Amended Exh. 21 at 14; NMED Exh. 31 at 16; NMED Amended Exh. 22 at 14; NMED Amended Exh. 27 at 14; NMED Amended Exh. 34 at 13; NMED Exh. 32 at 15; NMED Amended Exh. 23 at 14; NMED Amended Exh. 24 at 14.

"Reference" headings of this policy document.[46] The Department also testified that it analyzed demographic information of residents living within a 4-mile circle around the Facility using EPA's EJSCREEN tool, but the plain language of EO 2005-056 requires more than a demographic analysis – the order directs the Department to "utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities."[47]

The Department's application of NMED Policy 07-13 is insufficient to satisfy the Department's obligations according to EO 2005-056. The Department did not present testimony or evidence demonstrating it addressed its environmental justice obligations by other means. As a result, the Department's issuance of the proposed permits would not be in accordance with the law. The Department must, therefore, address its obligations pursuant to EO 2005-056 or deny the applications.

IV. Conclusion

Construction permits authorizing oil and gas facilities to emit air contaminants must always be developed and issued in accordance with the applicable air pollution laws and rules, but compliance with these legal requirements is even more important based on the fact that ozone levels in southeast New Mexico have and continue to reach levels that can seriously harm public health. In testimony and during the public hearing, Guardians presented an affirmative case in AQB 21-31, AQB 21-32, AQB 21-33, AQB 21-34, and AQB 21-35, that the Department's legal notices violated 20.2.72.206A.(3) NMAC. In testimony and during the public hearing, Guardians also presented an affirmative case in all eight XTO matters, AQB 21-31,

[46] *See* New Mexico Environment Department, Policy 07-13: Public Participation (Feb. 6, 2018).
[47] State of New Mexico, Executive Order 2005-056: Environmental Justice (Nov. 18, 2005) at 2.

AQB 21-32, AQB 21-33, AQB 21-34, AQB 21-35, AQB 21-39, AQB 21-40, and AQB 21-41, that the Facilities' proposed SSM/M emission limits for venting gas are not practically enforceable and, therefore, do not comply with the AQCA and the federal act. Finally, Guardians presented an affirmative case in all eight XTO matters for why issuance of the proposed permits by the Department would not be in accordance with the law because the Department failed to properly address its legal obligations pursuant to EO 2005-0056. Neither the Department nor the Applicant provided sufficient evidence to dispel the legal violations brought forth by Guardians and prove that the proposed permits can be legally issued. For these reasons, Guardians respectfully requests the Cabinet Secretary direct the Department to revise the proposed permits to remedy the deficiencies discussed above or deny the permit applications.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-31

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 8153M1 with the Department on September 25, 2020.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Bulldog Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on October 27, 2020, initiating a 30-day comment period.
4. Guardians submitted a timely public comment letter on November 24, 2020, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Bulldog facility on May 28, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on June 28, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated February 11, 2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 8153M1.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-31.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-31 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.
13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an

individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.

14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

16. The Department's legal notice for Application 8153M1 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-31_AR246-247.
17. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. 21-31_AR246-247.
18. The Department accepted WildEarth Guardians' public comments related to Application 8153M1, which were submitted electronically. 21-31_AR333-340, 341-346.
19. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020.
20. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and

depositing letters at a post office, present public health risks due to COVID-19, especially to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.

21. Partly responding to the public health emergency created by COVID-19, the Department revised and republished its legal notices for other construction permit applications, to include instructions for electronic public comment submission, but the Department did not revise and republish its legal notice for Application 8153M1.

Facts Regarding Proposed SSM/M Emission Limits

22. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-31_AR288-289.
23. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 289-290.
24. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

25. The Department testified that when it evaluated the proposed permit for the Bulldog facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 21 at 14.
26. NMED Policy 07-13 is the Department's policy regarding public participation.

27. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
28. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

29. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
30. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
31. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
32. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.
33. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.
34. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.

35. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).
36. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.
37. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.
38. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of

the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

39. Section 20.2.72.206A.(3) NMAC requires the Department to publish a public notice in the newspaper regarding pending construction permit applications, which includes a description of the manner in which comments or evidence may be submitted to the department.
40. Because the Department's legal notice of the permit application regarding the Bulldog facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the construction permit regulations at 20.2.72.206A.(3) NMAC.
41. Because the proposed permit modification for the Bulldog facility violated 20.2.72.206A.(3), an applicable regulation adopted pursuant to the AQCA, the Department must deny the permit application for the Bulldog facility. 20.2.72.208A. NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

42. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
43. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to

the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.

44. The proposed permit limitations for the Bulldog facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
45. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application.

Conclusions of Law regarding Executive Order 2005-056

46. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
47. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Bulldog facility.
48. The Department's issuance of the proposed permit for the Bulldog facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-32

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 8152M1 with the Department on September 30, 2020.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Jayhawk Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department published the Department's legal notice for the proposed permit in the Hobbs News-Sun on November 3, 2020, initiating a 30-day comment period.
4. Guardians submitted a timely public comment letter on December 3, 2020, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Jayhawk facility on May 28, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on June 28, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated February 11, 2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 8152M1.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-32.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-32 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.
13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an

individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.

14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

16. The Department's legal notice for Application 8152M1 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-32_AR434.
17. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. *Id*.
18. The Department accepted WildEarth Guardians' public comments related to Application 8152M1, which were submitted electronically. 21-32_AR575-582, 583-588.
19. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020.
20. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and depositing letters at a post office, present public health risks due to COVID-19, especially

to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.

21. Partly responding to the public health emergency created by COVID-19, the Department revised and republished its legal notices for other construction permit applications, to include instructions for electronic public comment submission, but the Department did not revise and republish its legal notice for Application 8152M1.

Facts Regarding Proposed SSM/M Emission Limits

22. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-32_AR484.
23. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 486-487.
24. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

25. The Department testified that when it evaluated the proposed permit for the Jayhawk facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 31 at 16.
26. NMED Policy 07-13 is the Department's policy regarding public participation.
27. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.

28. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

29. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
30. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
31. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
32. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.
33. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.
34. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.
35. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

36. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

37. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

38. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department

chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

39. Section 20.2.72.206A.(3) NMAC requires the Department to publish a public notice in the newspaper regarding pending construction permit applications, which includes a description of the manner in which comments or evidence may be submitted to the department.
40. Because the Department's legal notice of the permit application regarding the Jayhawk facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the construction permit regulations at 20.2.72.206A.(3) NMAC.
41. Because the proposed permit modification for the Jayhawk facility violated 20.2.72.206A.(3), an applicable regulation adopted pursuant to the AQCA, the Department must deny the permit application for the Jayhawk facility. 20.2.72.208A. NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

42. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
43. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.

44. The proposed permit limitations for the Jayhawk facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
45. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Jayhawk facility.

Conclusions of Law regarding Executive Order 2005-056

46. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
47. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Jayhawk facility.
48. The Department's issuance of the proposed permit for the Jayhawk facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-33

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 8349M2 with the Department on September 30, 2020.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Longhorn Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on November 3, 2020, initiating a 30-day comment period.
4. Guardians submitted a timely public comment letter on December 3, 2020, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Longhorn facility on May 28, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on June 28, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated February 11, 2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 8349M2.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-33.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-33 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.
13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an

individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.

14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

16. The Department's legal notice for Application 8349M2 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-33_AR227.
17. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. *Id*.
18. The Department accepted WildEarth Guardians' public comments related to Application 8349M2, which were submitted electronically. 21-33_AR312-319, 884-889.
19. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020.
20. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and depositing letters at a post office, present public health risks due to COVID-19, especially

to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.

21. Partly responding to the public health emergency created by COVID-19, the Department revised and republished its legal notices for other construction permit applications, to include instructions for electronic public comment submission, but the Department did not revise and republish its legal notice for Application 8349M2.

Facts Regarding Proposed SSM/M Emission Limits

22. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-33_AR268.
23. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 269-270.
24. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

25. The Department testified that when it evaluated the proposed permit for the Longhorn facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 22 at 14.
26. NMED Policy 07-13 is the Department's policy regarding public participation.
27. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.

28. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

29. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
30. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
31. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
32. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.
33. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.
34. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.
35. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

36. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

37. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

38. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department

chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

39. Section 20.2.72.206A.(3) NMAC requires the Department to publish a public notice in the newspaper regarding pending construction permit applications, which includes a description of the manner in which comments or evidence may be submitted to the department.
40. Because the Department's legal notice of the permit application regarding the Longhorn facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the construction permit regulations at 20.2.72.206A.(3) NMAC.
41. Because the proposed permit modification for the Longhorn facility violated 20.2.72.206A.(3), an applicable regulation adopted pursuant to the AQCA, the Department must deny the permit application for the Longhorn facility. 20.2.72.208A. NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

42. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
43. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.

44. The proposed permit limitations for the Longhorn facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
45. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Longhorn facility.

Conclusions of Law regarding Executive Order 2005-056

46. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
47. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Longhorn facility.
48. The Department's issuance of the proposed permit for the Longhorn facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-34

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 7877M1 with the Department on April 29, 2020.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Cowboy Central Delivery Point of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on June 2, 2020, initiating a 30-day comment period.
4. Guardians submitted a timely public comment letter on June 20, 2020, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Cowboy facility on February 23, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on March 25, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1, 2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 7877M1.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-34.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-34 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.
13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an

individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.

14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

16. The Department's legal notice for Application 7877M1 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-34_AR872.
17. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. *Id*.
18. The Department accepted WildEarth Guardians' public comments related to Application 7877M1, which were submitted electronically. 21-34_AR891-893, 3265-3270.
19. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020.
20. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and depositing letters at a post office, present public health risks due to COVID-19, especially

to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.

21. Partly responding to the public health emergency created by COVID-19, the Department revised and republished its legal notices for other construction permit applications, to include instructions for electronic public comment submission, but the Department did not revise and republish its legal notice for Application 7877M1.

Facts Regarding Proposed SSM/M Emission Limits

22. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-34_AR358-359.
23. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 359-361.
24. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

25. The Department testified that when it evaluated the proposed permit for the Cowboy facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 27 at 14.
26. NMED Policy 07-13 is the Department's policy regarding public participation.
27. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.

28. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

29. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
30. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
31. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
32. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.
33. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.
34. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.
35. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

36. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

37. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

38. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department

chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

39. Section 20.2.72.206A.(3) NMAC requires the Department to publish a public notice in the newspaper regarding pending construction permit applications, which includes a description of the manner in which comments or evidence may be submitted to the department.
40. Because the Department's legal notice of the permit application regarding the Cowboy facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the construction permit regulations at 20.2.72.206A.(3) NMAC.
41. Because the proposed permit modification for the Cowboy facility violated 20.2.72.206A.(3), an applicable regulation adopted pursuant to the AQCA, the Department must deny the permit application for the Cowboy facility. 20.2.72.208A. NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

42. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
43. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.

44. The proposed permit limitations for the Cowboy facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
45. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Cowboy facility.

Conclusions of Law regarding Executive Order 2005-056

46. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
47. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Cowboy facility.
48. The Department's issuance of the proposed permit for the Cowboy facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-35

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 7474M2 with the Department on June 8, 2020.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Wildcat Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on July 17, 2020, initiating a 30-day comment period.
4. Guardians submitted a timely public comment letter on July 27, 2020, raising issues of concern and requesting a public hearing.
5. The Department issued a final permit for the Wildcat facility on February 26, 2021, but the Department withdrew the issuance of this permit on March 3, 2021 because it had failed to offer a second 30-day comment period on the analysis of the permit application and draft permit.
6. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Wildcat facility on March 2, 2021, initiating the second public comment period.
7. Guardians submitted a second set of timely public comments on April 1, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.

8. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1, 2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 7474M2.
9. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-35.
10. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-35 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
11. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
12. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
13. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause

or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.

14. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.
15. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
16. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Legal Notice of the Permit Application

17. The Department's legal notice for Application 7474M2 indicated public comments should be mailed to the Department's physical address in Santa Fe, NM. 21-35_AR352.
18. The Department's legal notice did not indicate public comment would be accepted electronically or provide an email address where public comment would be accepted. *Id*.
19. The Department accepted WildEarth Guardians' public comments related to Application 7474M2, which were submitted electronically. 21-35_AR285-264, 273-277.

20. Due to COVID-19, New Mexico has been in a declared state of emergency since March 11, 2020.
21. Actions necessary for some members of the public to submit a public comment to the Department's physical address, such as buying postage, paper, and envelopes and depositing letters at a post office, present public health risks due to COVID-19, especially to individuals who are elderly, immune-compromised, have co-morbidities, or who care for friends or family that fall into these categories.
22. Partly responding to the public health emergency created by COVID-19, the Department revised and republished its legal notices for other construction permit applications, to include instructions for electronic public comment submission, but the Department did not revise and republish its legal notice for Application 7474M2.

Facts Regarding Proposed SSM/M Emission Limits

23. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-35_AR295-296.
24. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 297-298.
25. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

26. The Department testified that when it evaluated the proposed permit for the Wildcat facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 34 at 13.
27. NMED Policy 07-13 is the Department's policy regarding public participation.
28. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
29. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

30. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
31. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
32. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
33. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.

34. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.

35. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.

36. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

37. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

38. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

39. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality

standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Legal Notice of the Permit Application

40. Section 20.2.72.206A.(3) NMAC requires the Department to publish a public notice in the newspaper regarding pending construction permit applications, which includes a description of the manner in which comments or evidence may be submitted to the department.
41. Because the Department's legal notice of the permit application regarding the Wildcat facility did not indicate how members of the public could submit comments or evidence to the Department electronically, at an email address, the Department violated the construction permit regulations at 20.2.72.206A.(3) NMAC.
42. Because the proposed permit modification for the Wildcat facility violated 20.2.72.206A.(3), an applicable regulation adopted pursuant to the AQCA, the Department must deny the permit application for the Wildcat facility. 20.2.72.208A. NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

43. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
44. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.
45. The proposed permit limitations for the Wildcat facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
46. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Wildcat facility.

Conclusions of Law regarding Executive Order 2005-056

47. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
48. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Wildcat facility.

49. The Department's issuance of the proposed permit for the Wildcat facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-39

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 7565M2 with the Department on March 8, 2021.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Maverick Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department initially published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on April 9, 2021, but it subsequently published a revised version of the legal notice in the Carlsbad Current Argus on April 20, 2021, which included instructions for how the public could submit comments electronically. Publication of the revised legal notice initiated a 30-day comment period.
4. Guardians submitted a timely public comment letter on May 20, 2021, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Maverick facility on June 9, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on July 9, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1,

2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 7565M2.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-39.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-39 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.

13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.
14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Proposed SSM/M Emission Limits

16. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-39_AR484.
17. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 682-683.
18. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

19. The Department testified that when it evaluated the proposed permit for the Maverick facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 32 at 15.
20. NMED Policy 07-13 is the Department's policy regarding public participation.
21. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
22. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

23. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
24. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
25. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
26. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.

27. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.

28. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.

29. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

30. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

31. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

32. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality

standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

33. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
34. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.
35. The proposed permit limitations for the Maverick facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
36. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Maverick facility.

Conclusions of Law regarding Executive Order 2005-056

37. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
38. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Maverick facility.
39. The Department's issuance of the proposed permit for the Maverick facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-40

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 7681M2 with the Department on March 8, 2021.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Spartan Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department initially published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on April 8, 2021, but it subsequently published a revised version of the legal notice in the Carlsbad Current Argus on April 24, 201, which included instructions for how the public could submit comments electronically. Publication of the revised legal notice initiated a 30-day comment period.
4. Guardians submitted a timely public comment letter on May 24, 2021, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Spartan facility on June 10, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on July 12, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1,

2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 7681M2.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-40.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-40 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.

13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.
14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Proposed SSM/M Emission Limits

16. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-40_AR344.
17. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 345-346.
18. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

19. The Department testified that when it evaluated the proposed permit for the Maverick facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 23 at 14.
20. NMED Policy 07-13 is the Department's policy regarding public participation.
21. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
22. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

23. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
24. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
25. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
26. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.

27. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.

28. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.

29. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

30. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

31. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

32. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality

standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

33. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
34. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.
35. The proposed permit limitations for the Spartan facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
36. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Spartan facility.

Conclusions of Law regarding Executive Order 2005-056

37. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
38. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Spartan facility.
39. The Department's issuance of the proposed permit for the Spartan facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR AQB 21-41

Findings of Fact

Procedural Facts

1. The Applicant, XTO Energy, Inc., filed Application 7623M2 with the Department on March 8, 2021.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Tiger Compressor Station of nitrogen oxides and of volatile organic compounds, among other pollutants.
3. The Department initially published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on April 9, 2021, but it subsequently published a revised version of the legal notice in the Carlsbad Current Argus on April 20, 2021, which included instructions for how the public could submit comments electronically. Publication of the revised legal notice initiated a 30-day comment period.
4. Guardians submitted a timely public comment letter on May 24, 2021, raising issues of concern and requesting a public hearing.
5. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit related to the Tiger facility on June 11, 2021, initiating the second public comment period.
6. Guardians submitted a second set of timely public comments on July 12, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
7. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1,

2021 Cabinet Secretary James Kenney granted a public hearing for XTO's Application 7623M2.

8. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-41.
9. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-41 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
10. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
11. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
12. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.

13. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.
14. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
15. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Proposed SSM/M Emission Limits

16. The proposed permit includes limits restricting venting emissions as a result of startup, shutdown, maintenance events to 10 tpy of VOCs and, for malfunction events, restricting emissions to 10 tons per year of VOCs. 21-41_AR343.
17. To ensure compliance with the SSM and malfunction emission limits, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM and malfunction events. *Id*. at 344-345.
18. The method for measuring the volume of gas vented during SSM and malfunction events is not included in the draft permit. *Id*.

Facts Regarding the Executive Order 2005-056

19. The Department testified that when it evaluated the proposed permit for the Maverick facility, it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13. NMED Amended Exh. 24 at 14.
20. NMED Policy 07-13 is the Department's policy regarding public participation.
21. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
22. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

23. The Record Proper and any part thereof shall be evidence. 20.1.4.400B.(3) NMAC.
24. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk. 20.1.4.7A.(19) NMAC.
25. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition. 20.1.4.7A.(2) NMAC.
26. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift. 20.1.4.400A.(1) NMAC.

27. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed. *Id*.

28. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition. *Id*.

29. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law. NMSA 1978 § 74-2-9(C).

30. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.

31. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.

32. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality

standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

33. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
34. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.
35. The proposed permit limitations for the Tiger facility for SSM and malfunction venting events are not practically enforceable because the proposed permit does not specify a method for measuring the total quantity of pollutants emitted during these events.
36. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application for the Tiger facility.

Conclusions of Law regarding Executive Order 2005-056

37. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
38. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Tiger facility.
39. The Department's issuance of the proposed permit for the Tiger facility without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

Respectfully submitted this 3rd day of December, 2021,

/s/ Matthew A. Nykiel
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of **WILDEARTH GUARDIANS' POST-HEARING SUBMITTAL** was served on December 3, 2021 via email to the persons listed below:

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